UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A., AFL-CIO, **Petitioner,**	)	
v.	)	**Case No. 14-1211**
NATIONAL LABOR RELATIONS BOARD **Respondent,**	)	
and	)	
G&L ASSOCIATED, INC., d/b/a USA FIRE PROTECTION, **Intervenor.**	)	

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

PETITION FOR REHEARING AND REHEARING EN BANC BY PETITIONER

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Petitioner Road Sprinkler Fitters Local 669 ("Local 669" or "the Union") requests panel rehearing and rehearing *en banc* from the Court in the matters of this case and its companion (No. 15-1014).[1]

STATEMENT UNDER FED. R. APP. 35(b)(1)

The two decisions by the NLRB below, deferred to and affirmed by the panel, represent a substantial departure from the same fundamental labor law principle: the NLRB refused to enforce the written labor agreements, by which the employers "unconditionally acknowledg[ed] and confirm[ed] that Local 669 is the exclusive bargaining representative of its sprinkler fitter employees *pursuant to Section 9(a) of the National Labor Relations Act* ("NLRA")," and instead permitted the employers to retroactively repudiate their NLRA Section 9(a) agreements with the Union as their defense to the NLRB's refusal to bargain Complaints.

In both cases, the NLRB ruled that, regardless of the explicit, unambiguous and unconditional NLRA Section 9(a) language of the agreements, the employers

[1] Local 669 petitioned for review of the original decisions of the National Labor Relations Board ("NLRB" or "the Board") (Case No. 13-1057); that Petition was dismissed, following the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). The NLRB reaffirmed both decisions, *G&L Assoc., Inc. d/b/a USA Fire Prot. ("USA Fire")*, 358 NLRB No. 162 (2012), *reaffirmed* 361 NLRB No. 58 (2014)(A 28); *Austin Fire Equipment LLC ("Austin")*, 359 NLRB No. 3 (2012), *reaffirmed* 361 NLRB No. 76 (2014) (A 43) and Local 669 re-filed its Petition. On January 20, 2015, the Court severed the cases for purposes of review.

did not intend to, and did not enter into an enforceable bargaining relationship governed by NLRA Section 9(a).[2] *USA Fire* (A 28). And, in both cases, the reviewing panel summarily deferred to the NLRB's rulings in unpublished decisions and without holding oral argument. AD 2-4.

1. The NLRB and panel decisions violate a cardinal rule of federal labor law, recently restated by the Supreme Court in *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (Jan. 26, 2015): labor contracts are to be interpreted and enforced "according to ordinary principles of contract law [and that] …'where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent.'" 135 S. Ct. at 933; *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957); *Commonwealth Communications, Inc. v. NLRB*, 312 F.3d 465, 468 (D.C. Cir. 2003) (unambiguous labor contracts are to be enforced according to their written terms).[3]

The NLRB and the panel both completely ignored the "clear and unambiguous" terms of the parties' agreements here, and in particular the explicit

[2] "A" references are to the record appendix; "AD" references are to the attached addendum containing the panel decision.

[3] *M&G Polymers* has been consistently applied by the circuit courts. *Hallmark-Phoenix 3, LLC v. NLRB*, 2016 U.S. App. LEXIS 5554, *14-15 (5th Cir. Mar. 24, 2016); *Gallo v. Moen, Inc.*, 813 F.3d 265, 267 (6th Cir. 2016); *United Ass'n of Journeyman & Apprentice Plumbers & Pipefitters Local 74 v. IBEW Local 313*, 2016 U.S. App. LEXIS 3621, *8-9 (3rd Cir. Del. Feb. 29, 2016) (concurring opinion); *Michels Corp. v. Central States*, 800 F.3d 411, 417 (7th Cir. 2015).

citation to NLRA Section 9(a) as the statutory basis for the agreements, and then "ascertained" that the meaning of the parties' agreements was the reverse of that "plainly expressed intent," and permitted the signatory employers to revoke their agreements with the Union. *USA Fire* (A 28); AD 2-4.

2. The panel decisions are also contrary to the Court's rules for judicial review of labor contracts: upon review of an NLRB decision, the Court is to interpret and apply the language of a labor agreement *de novo*, rather than to simply defer to the Board's interpretation below. *Commonwealth Communications*, 312 F.3d at 468; *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 202-203 (1991). To the contrary here, the panel deferred to the NLRB's disregard for the plain language of the parties' Section 9(a) recognition agreements rather than simply reading and enforcing the plain English of the agreements for itself. AD. 2-4.

3. The panel failed to require the NLRB to provide a "principled explanation" for its arbitrary and contrived attempt below to distinguish away over twenty (20) years of consistent NLRB precedent which had upheld and enforced precisely the same "clear and unambiguous" wording of Local 669 Section 9(a) recognition agreements (that the employer recognized "… Local 669 [as] the exclusive bargaining representative of its sprinkler fitter employees pursuant to

Section 9(a) of the National Labor Relations Act"). [4] *Nat'l Black Media Coal. v. FCC*, 775 F.2d 342, 355 (D.C. Cir. 1985) ("If an agency wishes to depart from its consistent precedent it must provide a principled explanation for its change of direction").

Although these panel decisions are unpublished, they can be cited as persuasive legal authority, *Schlottman v. Perez*, 739 F.3d 21, 26 (D.C. Cir. 2014), and need to be addressed to maintain uniformity of the Court's precedents on these fundamental labor law issues.

ISSUES PRESENTED

1. Whether a *de novo* reading of the written construction industry recognition agreements here -- providing that "(t)he Employer therefore unconditionally acknowledges and confirms that Local 669 is the exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a) of the National Labor Relations Act" -- confirms that the parties intended to, and did enter into NLRA Section 9(a) bargaining relationships.

[4] *Triple A Fire Prot.*, 312 NLRB 1088, 1088 (1993), *enf'd*, 136 F.3d 727 (11th Cir. 1998), *cert. denied*, 525 U.S. 1067 (1999); *MFP Fire Prot.*, 318 NLRB 840, 842 (1995), *enf'd* 101 F.3d 1341 (10th Cir. 1996); *Am. Automatic Sprinkler Sys., Inc.*, 323 NLRB 920, 920-21 (1997), *enf'ment den. in part*, 163 F.3d 209 (4th Cir. 1998), *cert. denied*, 528 U.S. 821(1999); *Dominion Sprinkler Servs.*, 319 NLRB 624, 625 (1995); *Excel Fire Prot.*, 308 NLRB 341, 343 (1992).

2. Whether the NLRB failed to provide any "principled explanation for [the Board's] change of direction," and specifically for its failure to apply its own longstanding precedents enforcing the same explicit, unconditional and unambiguous contract language. *Nat'l Black Media Coal.*, 775 F.2d at 355.

STATEMENT OF THE CASE

The construction industry employers in this case and its companion case (No. 15-1014), voluntarily entered into the same written agreements with Local 669 which stated:

> The Employer executing this document below has, on the basis of objective and reliable information, confirmed that a clear majority of the sprinkler fitters in its employ are members of, and are represented by [Local 669] for purposes of collective bargaining.
>
> The Employer therefore unconditionally acknowledges and confirms that Local 669 is the exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a) of the National Labor Relations Act. *USA Fire* (A 32, 50).

The employers were later charged with having unlawfully refused to bargain with the Union, made the subject of a Complaint by the NLRB General Counsel on that basis and, as their defense, attempted to retroactively dissociate themselves from their voluntary and explicit Section 9(a) bargaining relationships, long after the expiration of the NLRA Section 10(b) limitation period. *Machinists v. NLRB (Bryan Mfg.)*, 362 U.S. 411, 419 (1960).

In both cases, the NLRB rejected the arguments by the NLRB General Counsel and Local 669, disregarded the explicit and unambiguous Section 9(a) language in the agreements, and concluded that the employers did not intend to, and did not enter into enforceable Section 9(a) collective bargaining relationships with the Union. *USA Fire* (A 28). The NLRB ruled in contradiction to the wording of the 9(a) agreements, that the employers had merely entered into construction industry "pre-hire" agreements pursuant to NLRA Section 8(f), and that they were free to retroactively revoke their agreements with the Union in defense to the NLRB Complaint, well after the expiration of the six month limitation period in NLRA Section 10(b). *USA Fire* (A 28).

The NLRB's entire legal rationale was that two words ("have designated") had been omitted from the introductory paragraph of earlier versions of Local 669 recognition agreements that had been previously upheld and enforced by the Board and the courts, and that the omission of those two words from the introductory paragraph rendered the agreements inadequate to establish Section 9(a) recognition in the construction industry under the Board's decision in *Staunton Fuel & Material (Central Illinois)*, 335 NLRB 717, 720 (2001). *USA Fire* (A 28).

According to the Board, the employers' agreements in these cases, by which they "… unconditionally acknowledge[d] and confirm[d] that Local 669 is the

exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a) of the National Labor Relations Act," failed to meet the *Staunton Fuel* standard. *USA Fire* (A 28).

Upon review, the panel denied oral argument and summarily affirmed the NLRB's rulings in unpublished decisions. AD 2-4.

ARGUMENT

A. The Plain Language of the Labor Agreements Under Review Can Only Be Read As Establishing NLRA Section 9(a) Recognition

As the Supreme Court has long held, and recently affirmed, labor agreements are to be enforced "according to ordinary principles of contract law;" where, as here, "the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent." *M&G Polymers*, 135 S. Ct. at 933 (citing *Textile Workers v. Lincoln Mills,* 353 U.S. at 456-57); *Hallmark-Phoenix 3,* 2016 U.S. App. LEXIS 5044, at *14-15; *Gallo*, 813 F.3d at 267; *United Ass'n of Plumbers, etc., Local 74* 2016 U.S. App. Lexis 3621, at *8-9; *Michels Corp.*, 800 F.3d at 417.

Neither the NLRB nor the panel even suggested that there was any ambiguity to be found in the wording of the recognition agreements at issue

and, of course, there is none. *Compare Commonwealth Communications*, 312 F.3d at 468.

Yet, in contradiction to these cardinal rules of labor law, the NLRB and then the panel simply ignored the wording of the recognition agreements stating in plain English that the signatory employers had voluntarily and "unconditionally acknowledge[ed] and confirm[ed] that Local 669 [was] the exclusive bargaining representative of its sprinkler fitter employees *pursuant to Section 9(a) of the National Labor Relations Act*." *USA Fire* (A 28); AD 2.

The Board and the panel somehow "ascertained" that the signatory employers intended to enter into voidable "pre-hire" agreements under NLRA Section 8(f), contrary to the "plainly expressed intent" of the agreements to recognize the Union as "the exclusive bargaining representative of its sprinkler fitter employees *pursuant to Section 9(a) of the National Labor Relations Act*," *M&G Polymers*, 135 S. Ct. at 933, and that the employers were therefore free to repudiate their labor agreements with the Union. *USA Fire* (A 28); AD 2.

The panel deferred to and endorsed the NLRB's attempt to re-write the plain language of the parties' agreements, rather than to simply read the plain English of

the clauses at issue *de novo*. *Commonwealth Communications*, 312 F.3d at 468; *Litton Fin. Printing Div.*, 501 U.S. at 202-203.

B. The Panel Erred in Summarily Affirming the NLRB's Misreading of the Unambiguous Contract Language

The panel decisions reflect several additional departures from the Court's precedent for which we urge rehearing by the panel:

1. The lynchpin of the panel's misapprehension of these cases is its affirmation of the NLRB's misplaced reliance upon *Staunton Fuel & Material (Central Illinois)*, 335 NLRB 717 (2001). AD 3.

In *Staunton Fuel*, the Board was presented with the question of how to interpret labor agreements that *do not* specifically cite the underlying legal basis for the parties' bargaining relationship, and to that end set forth a three-part test for determining whether such an inexplicit agreement can be sufficient to establish an NLRA Section 9(a) bargaining relationship. 335 NLRB at 717, 720. Contrary to the panel's misstatement (AD 2), Local 669 did not acknowledge that *Staunton Fuel* is the legal standard governing these cases and, as we continue to show, it is not.

The NLRB's most recent statement of the standard for determining whether or not a construction industry employer and union have entered into a valid Section 9(a) bargaining relationship, as we cited to the NLRB and to the panel, is whether the wording of the parties' recognition agreement "when examined in its entirety,

'conclusively notif[ied] the parties that a 9(a) relationship is intended. When it does so, the presumption of an 8(f) status has been rebutted.'" *Madison Indus., Inc.*, 349 NLRB 1306, 1308 (2007) (citing *NLRB v. Okla. Installation Co.*, 219 F.3d 1160, 1165 (10th Cir. 2000)). *See also Allied Mechanical Servs.*, 351 NLRB 79, 82 (2007), *enf'd* 688 F.3d 758 (D.C. Cir. 2012); Pet. Br. 7; Pet. Reply 7.

The wording of recognition agreements here, by which the employers "unconditionally acknowledge[d] and confirm[ed] that Local 669 [was] *the exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a)* of the National Labor Relations Act," easily satisfies this standard and, indeed, that the wording can *only* be read as having "'…conclusively notif[ied] the parties that a 9(a) relationship [was] intended.'" *Madison Indus., Inc.*, 349 NLRB at 1308.

The Board's decision in *Staunton Fuel*, the entire precedential authority cited by the NLRB and the panel for a contrary result, is readily distinguishable and, if anything, supports the Union's position in this matter. Pet. Br. 19; Pet. Reply 11.

As noted, *Staunton Fuel* addressed construction industry labor agreements, in contrast to the agreements here, that are *not explicit* and therefore inconclusive as to the legal basis for the parties' relationship; and the Board set forth a three-part test for determining whether such indefinite wording would be sufficient to

establish the parties had entered into an NLRA Section 9(a) bargaining relationship. 335 NLRB at 717, 720.

What the NLRB further pointed out in *Staunton Fuel*, and what both the NLRB and the panel overlooked in these cases, is that where, as here, the wording of the clause *is explicit* and unambiguous as to the Section 9(a) basis for the parties' bargaining relationship there is no ambiguity as to the nature of that relationship:

> [a]lthough it [is] not [ ] necessary for a contract provision to refer *explicitly* to Sec. 9(a) … such a reference *would indicate* that the parties intended to establish a majority [9(a)] rather than an 8(f) relationship.

335 NLRB at 720 (emphasis added). Pet. Br. 17; Pet. Reply 11.[5]

Thus, the NLRB's anomalous conclusion, that explicit, unambiguous contractual language reciting the parties' intention to form a 9(a) bargaining relationship does not, as a matter of law, establish that the parties intended to form, and did form an NLRB Section 9(a) relationship, is premised upon an inapposite

[5] *Staunton Fuel* did not overrule cases holding that union membership was an insufficient predicate for an explicit grant of Section 9(a) recognition. AD 3. The cases rejected in *Staunton Fuel* dealt with the situation where the union claimed that an agreement merely asserting that a majority of unit employees were union members, *without any citation to NLRA Section 9(a)*, was sufficient to establish NLRA Section 9(a) recognition. 335 NLRB at 717; Pet. Reply 12. Those cases are likewise inapposite to the question here of whether an employer's voluntary, written and explicit Section 9(a) recognition agreement with a union should be enforced.

legal citation to *Staunton Fuel* and is contrary to the NLRB's own standards. *Madison Indus.*, 349 NLRB at 1308; *Staunton Fuel*, 335 NLRB at 720.

2. Where an administrative agency "wishes to depart from its consistent precedent [the reviewing court must require that the agency] provide a principled explanation for its change of direction." *Nat'l Black Media Coal.*, 775 F.2d at 355.

The panel failed to hold the NLRB accountable for its blatant violation of that standard; contrary to the panel's affirmation (AD 3), there is no "critical" distinction between the wording of the 9(a) recognition agreements at issue and "similar" Local 669 recognition agreements previously enforced by the Board:

The Employer executing this document below has, on the basis of objective and reliable information, confirmed that a clear majority of the sprinkler fitters in its employ have designated, are members of, and are represented by [Local 669] for purposes of collective bargaining. The Employer therefore unconditionally acknowledges and confirms that Local 669 is the exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a) of the National Labor Relations Act. [6]	The Employer executing this document below has, on the basis of objective and reliable information, confirmed that a clear majority of the sprinkler fitters in its employ are members of, and are represented by [Local 669] for purposes of collective bargaining. The Employer therefore unconditionally acknowledges and confirms that [Local 669] is the exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a) of the National Labor Relations Act. [7]

[6] *E.g. See Triple A Fire Prot.*, 312 NLRB at 1088 (1993); *MFP Fire Prot.*, 318 NLRB at 842; *Am. Automatic Sprinkler*, 323 NLRB at 920-21; *Dominion Sprinkler Servs.*, 319 NLRB at 625; *Excel Fire Prot.*, 308 NLRB at 343.

[7] *USA Fire* (A. 28).

The two word distinction in the introductory sentences is anything but "critical" (AD 3) and does not in any way detract from the intended meaning of the explicit wording of both agreements that "… 'conclusively notif[ied] the parties that a 9(a) relationship is intended, '" *Madison Indus.*, 349 NLRB at 1308; *NLRB v. Okla. Installation Co.*, 219 F.3d at 1165; *Staunton Fuel*, 335 NLRB at 720.[8]

And the NLRB's attempts to muster a legally significant line of demarcation between the virtually identical wording of the two clauses (*USA Fire* (A 28)) can hardly be said to provide a "principled explanation for [such a] change of direction." *Nat'l Black Media Coal.*, 775 F.2d at 355.

CONCLUSION

The determinative legal issue in these companion cases -- whether by entering into agreements that provide that the employers "unconditionally acknowledge[d] and confirm[ed] that Local 669 [was] *the exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a)* of the

[8] Any contention that the "express contractual language indicating the parties' intent to form a 9(a) agreement" can be negated by the omission of two insignificant words from the introductory paragraph (AD 4), violates yet another settled labor law precept: the Court has repeatedly rejected attempts to require that the wording of Section 9(a) recognition agreements adhere to any "special formula," or semantic terms of art. *M&M Backhoe Serv.*, 469 F.3d 1047, 1051 (D.C. Cir. 2006); *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732, 741 (D.C. Cir. 1950), *cert. denied* 341 U.S. 914 (1951). Pet. Br. 21.

[NLRA]," the employers intended to and did enter into enforceable Section 9(a) bargaining relationships -- is a question that answers itself. The panel should reconsider and reverse the NLRB's rulings in these cases, or the Court should withdraw the panel decisions and rehear these cases *en banc*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system and that a hard copy of the bound petition was served on all parties via first class mail, postage prepaid.

/s/ William W. Osborne, Jr.
William W. Osborne, Jr.

ADDENDUM

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1211 **September Term, 2015**

FILED ON: MARCH 10, 2016

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A., AFL-CIO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

G & L ASSOCIATED, INC.,
INTERVENOR

On Petition for Review of an Order of
the National Labor Relations Board

Before: TATEL, BROWN and MILLETT, *Circuit Judges*.

JUDGMENT

This petition for review was considered on the record from the National Labor Relations Board and on the briefs of the parties. *See* Fed. R. App. P. 34(a)(2); D.C. Cir. R. 34(j). The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). It is

ORDERED and ADJUDGED that the petition for review be denied.

In *Staunton Fuel*, the National Labor Relations Board established that a contract between a union and an employer can overcome the presumption that a construction-industry bargaining relationship is governed by section 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f), rather than section 9(a), *id.* § 159(a), if the contract's language "unequivocally indicates that (1) the union requested recognition as the majority or 9(a) representative of the unit employees; (2) the employer recognized the union as the majority or 9(a) bargaining representative; and (3) the employer's recognition was based on the union's having shown, or having offered to show, evidence of its majority support," *In re Staunton Fuel & Material, Inc.*, 335 N.L.R.B. 717, 720 (2001). The Board applied the *Staunton Fuel* test, and the appellant Union does not dispute that it provides the dispositive legal standard, so we assume its applicability here.

G&L Associated, Inc., d/b/a USA Fire Protection ("USA Fire"), a company that installs building sprinklers, and Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO ("the Union") entered into a collective bargaining agreement that says the following:

> The employer executing this document below has, on the basis of objective and reliable information, confirmed that a clear majority of the sprinkler fitters in its employ are members of, and are represented by Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO, for purposes of collective bargaining.
>
> The employer therefore unconditionally acknowledges and confirms that Local Union 669 is the exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a) of the National Labor Relations Act.

G&L Associated, Inc. d/b/a USA Fire Protection, 358 N.L.R.B. No. 162 (2012).

The Board found that this language failed to satisfy the third *Staunton Fuel* requirement. We agree. Although the contract indicates that USA Fire had evidence that a majority of the relevant employees were "represented by" the Union and were "members of" the Union, *Staunton Fuel* expressly holds that such evidence is insufficient to satisfy the third requirement:

> [W]ith respect to the union's claim of majority support, there is a significant difference between a contractual statement that the union "represents" a majority of union employees—which would be accurate under either an 8(f) or a 9(a) agreement—and a statement to the effect that, for example, the union "has the support" or "has the authorization" of a majority to represent them. Similarly, a provision stating only that a majority of unit employees "are members" of the union would be consistent with a union security obligation under either an 8(f) or a 9(a) relationship and is therefore insufficient to confirm 9(a) status.

Staunton Fuel, 335 N.L.R.B. at 720 (internal citation omitted).

None of the Union's three arguments to the contrary is convincing. First, it cites cases predating *Staunton Fuel* that found evidence of majority membership or representation sufficient to establish a 9(a) agreement and argues that such evidence remains sufficient. But *Staunton Fuel* expressly stated that such evidence is no longer adequate and overruled its prior cases that relied on majority membership: "[t]o the extent that any of our . . . cases may be read to imply that an agreement indicating that the union 'represents a majority' or has a majority of 'members' in the unit, without more, is independently sufficient to establish 9(a) status, those cases are overruled." *Id.*

Second, it asserts that express contractual language indicating the parties' intent to form a 9(a) agreement overcomes any need to have evidence of majority support. *Staunton Fuel* is clear, however, that to overcome the 8(f) presumption, contractual language must demonstrate both party intent to form a 9(a) relationship and evidence of majority support.

Third, the Union asserts that the Board's decision in this case conflicts with prior decisions in which the Board concluded that similar Union contracts established 9(a) agreements. In those cases, however, the contracts stated that the employer had information confirming that a majority of the relevant employees "ha[d] designated" the Union "for purposes of collective bargaining," *e.g.*, *Triple A Fire Protection, Inc.*, 312 N.L.R.B. 1088, 1088 (1993), a critical distinction because such language may provide what is missing here: evidence of majority authorization.[1]

The Union finally asserts that section 10(b) of the Act, which bars challenges to the validity of a 9(a) agreement more than six months after the agreement begins, *see Raymond F. Kravis Center for Performing Arts, Inc. v. NLRB*, 550 F.3d 1183, 1189–90 (D.C. Cir. 2008), prevented USA Fire from asserting that the contract established a section 8(f) agreement. We have previously rejected this exact argument, explaining that it "begs the question" because "[t]he fundamental issue . . . is whether the . . . contract was subject to section 8(f) or 9(a)." *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531, 539 (D.C. Cir. 2003); *accord Brennan Sand & Gravel Co.*, 289 N.L.R.B. 977, 979 (1988). Because the contract established only a section 8(f) agreement, section 10(b) does not apply.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk

[1] Our review is confined to the reasons given by the Board. *See, e.g.*, *Macmillan Publishing Co. v. NLRB*, 194 F.3d 165, 168 (D.C. Cir. 1999) ("We cannot sustain agency action on grounds other than those adopted by the agency in the administrative proceedings."). The Board was explicit that it considered only the language in the agreement, and we do the same in holding that its language is insufficient to establish a section 9(a) relationship.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

Petitioner is Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO ("Local 669"). The Respondent is the National Labor Relations Board ("NLRB"). G & L Associated, Inc. d/b/a USA Fire Protection ("USA Fire") has been granted leave to intervene. *See* Docket No. 1528249.

DISCLOSURE STATEMENT

Pursuant to F.R.A.P. and D.C. Circuit Rule 26.1, Petitioner Local 669 makes the following disclosures:

1. Local 669 is an unincorporated labor organization, is not a publicly held entity or corporation, and does not have any affiliates which have issued stock to the public.
2. As a labor organization, Local 669 is not required to list identities or persons who have represented the party's general nature.